SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 391

JOSEPH B. BRUNER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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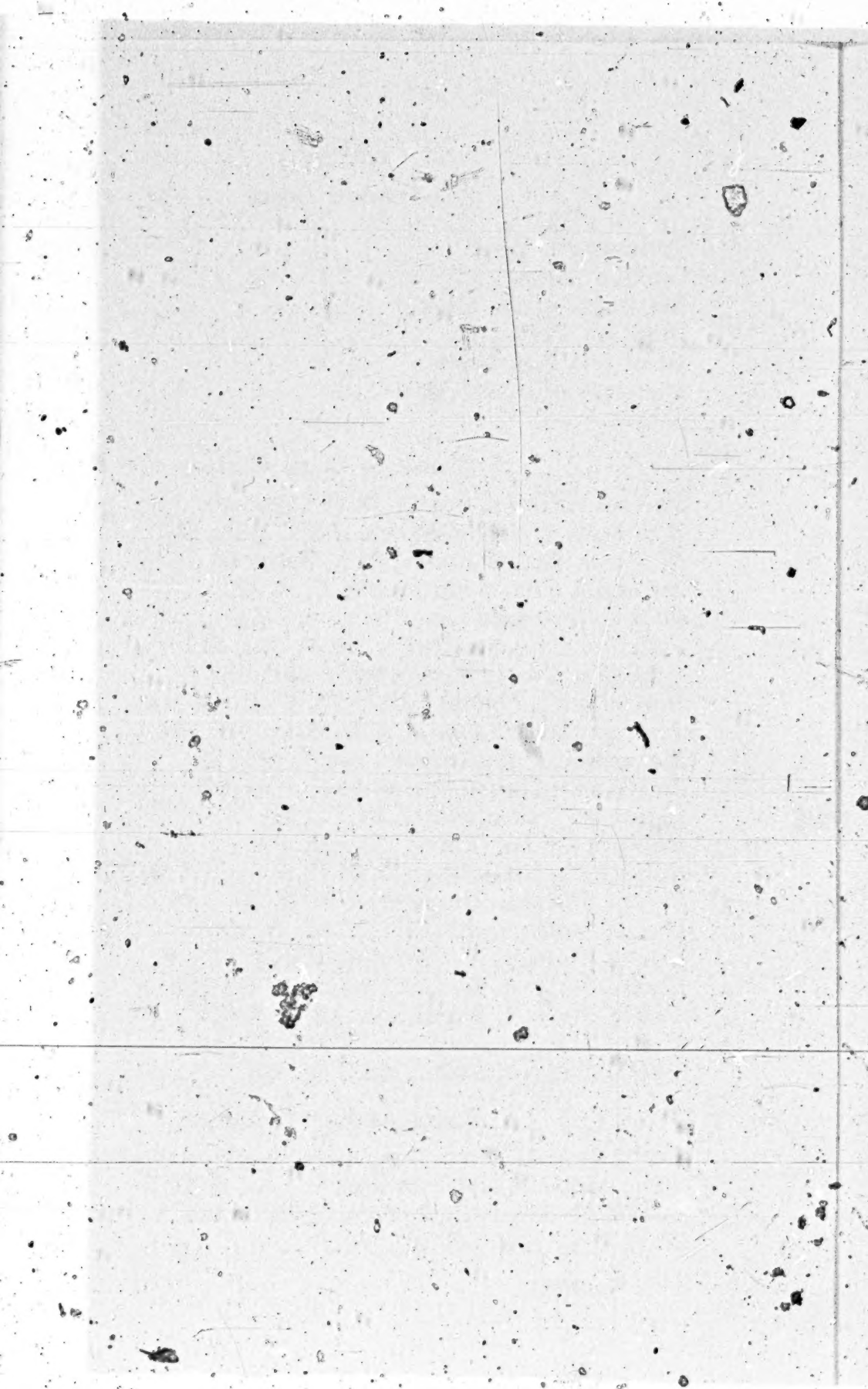

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Opinion Below

The District Court for the Middle District of Georgia did not issue any opinion to accompany its orders. The opinion of the Court of Appeals for the Fifth Circuit is reported in 189 Fed. 2d 255. This court granted certiorari on October 22, 1951.

Statement of the Case

On March 23, 1948, Joseph B. Bruner, the petitioner here, filed his complaint in the District Court of the United States

for the Middle District of Georgia seeking to recover compensation for overtime for services rendered the United States as a civil service employee, firefighter, at Camp Wheeler, Georgia, a United States military installation.

The petitioner was employed by someone in the personnel department at the local army installation, went to work and was paid for several months without further confirmation from other authority. He then received a probational appointment dated May 20, 1941 which appointment provided that it was for a period of six months and was signed with the name of an administrative assistant of the Secretary of War, the name of that assistant having apparently been affixed by some other person (plaintiff's exhibit #1). Petitioner was employed in the same manner and in a like procedure as every civilian employee of the War Department. There was no specific act creating petitioner's job. It was and is contended by respondent that the authority for petitioner's employment was based on the blanket authority in the Act of June 26, 1930, 46 Stat. 817, 5 U. S. C. 43, which Act authorizes each individual department to employ such number of "employees" of the various classes therein provided, as may be appropriated for by Congress from year to year. This Act authorized the head of any department to delegate to his subordinates the power, under regulations prescribed by him, to employ.

Upon motion of the respondent, the District Court dismissed petitioner's suit on the ground that he was an "officer of the United States" within the meaning of 28 U. S. C. 1346 (d)(2) and hence was barred from bringing suit in the District Court to recover compensation for overtime pay. The Court of Appeals affirmed this decision (189 F. 2d 255).

Question Presented

The bare question presented in this case to this Court is whether petitioner is an "officer of the United States" within the meaning of 28 U. S. C. 1346 (d)(2) and hence barred from bringing suit in the District Court to recover compensation for overtime. The question necessarily includes the question—"Are all employees of the United States 'officers' of the United States?"

Brief and Argument

The Government contends, and the District and Circuit Courts so held, that this plaintiff is precluded from bringing an action in the District Court to recover overtime pay by the terms of the so-called Tucker Act.

That Act, 28 U. S. C. 1346 (d)(2), provides:

"(d) The District Court shall not have any jurisdiction under this section of: (2) Any civil action to recover fees, salary or compensation for official services of officers of the United States."

Relying on this Section the Government moved to dismiss the plaintiff's complaint. The District Court granted the motion and the Fifth Circuit affirmed the action of the District Court.

So far as we have been able to determine this court has never passed upon this statute as to its application to the various classes employed by the Government. This court has, however, fully considered the meaning of the phrase "officer of the United States" as it is used in other circumstances.

This Court has held that the phrase "officer of the United States" means a person appointed pursuant to the provisions of Article II, Sec. 2, Cl. 2 of the Constitution. *United*

States v. *Germaine*, 99 U. S. 508. The pertinent part of that section is:

"(The President) * * * shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court and *all* other *Officers* of the United States, whose Appointments are not *herein* otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think appropriate, in the President alone, in the Courts of Law or in the Heads of Departments." (The words emphasized are those emphasized by the Court in its consideration of the *Germaine* case.)

In *United States* v. *Mourat*, 124 U. S. 303, 307, this Court said:

> "Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the Courts of Justice or Heads of Departments *authorized by law* to make such an appointment, he is not, strictly speaking, an officer of the United States." (Emphasis ours)

Heads of Departments are defined to be what are now called the members of the Cabinet. *U. S.* v. *Germaine, supra; U. S.* v. *Mourat, supra.*

The two last quoted decisions of this court, and the interpretation of the phrase "officer of the United States" there given have been followed and quoted extensively by the lower courts that have been called upon to consider the same phrase in an interpretation of the statute here in question. Thus it has been held that the jurisdictional prohibition of that section is applicable to "constitutional officers" i. e. those officers appointed pursuant to Article II, Sec. 2, Cl. 2 of the Constitution. *United States* v. *McCrory*, 91 Fed.

295 (C. C. A. 5, 1899); *Cain* v. *United States*, 73 F. Supp. 1019 (D. C. Ill. 1947); *Brooks* v. *United States*, 33 F. Supp. 68 (D. C. N. Y. 1940).

We do not believe that petitioner and respondent are at odds on the proposition that the term "officer of the United States" as used in the statute here in question includes only "constitutional officers".

If the petitioner is to be held an "officer", he must have been appointed within the terms of the quoted clause of the Constitution. It is of course obvious that he was not appointed by (1) the President or (2) a Court of Law, so it remains to be determined whether he was appointed by a Head of a Department authorized by law to make such an appointment.

It is the contention of petitioner that to constitute him an "officer" it must be found that (1) he was appointed by the Secretary of War; *and* (2) the Secretary of War was required to make the appointment; *and* (3) the job he held was specifically created by statute? It is our contention that the failure of *any one* of those three prerequisites would preclude a finding that petitioner is an "officer". This was the rationale adopted by the Sixth Circuit in deciding the case of *Beal et al.* v. *United States*, 182 F. (2d) 565, wherein it was decided that persons such as petitioner were not "officers". It is apparently here where lies the distinction between *Kennedy* v. *United States*, 146 F. (2d) 26 on which the Fifth Circuit relied in deciding the case at bar, on which the Government's position rests.

That the rationale of the Sixth Circuit is the correct one becomes clear when the decisions of this court which have considered the phrase are examined.

In *Burnap* v. *United States*, 252 U. S. 512, this court held:

> "Whether (a person) is an *officer* or an *employee* is determined by the manner in which Congress has spe-

cifically provided for the creation of the several positions, their duties, and appointment thereto."

There the Court says: (1) specific creation of the position *and* (2) manner of appointment. It could not then, we submit, be clearer that in the absence of any one of the prerequisites a person is not an officer. In *Beal et al.* v. *United States, supra,* the Sixth Circuit said: "If any one of the three alleged prerequisites that distinguishes officers from mere employees is wanting, the status of persons as officers of the United States is not established."

(1) Was Petitioner Appointed by the Secretary of War?

The record shows that the petitioner was employed first; his "appointment" was over the name of an administrative assistant which was apparently affixed by some third person not identified. We suggest that in this period of multiple employment that the name was probably affixed by persons other than that assistant whose sole duty was to do so. It didn't involve the exercise of any discretion, but was purely a clerical function.

> "The Constitution in the use of the words 'all other officers' indicates clearly that it has provided and defined the only methods by which its officers can be appointed; and *if an appointment is made in any other mode, the appointee is not an officer of the United States within the meaning of that instrument.*" (Emphasis ours.) *Scully* v. *United States,* 193 Fed. 185, (C. C. Nev. 1910).

Here it is beyond question that the most dignity that could be ascribed to the appointive power is that it was delegated downward to an administrative assistant and by him delegated to another. The Constitution said that Congress may "*vest the appointment* * * * in the Heads of Departments." Art. II, Sec. 2, Cl. 2. (Emphasis ours.)

The Constitution didn't authorize the Congress to give the Heads of Departments the power to *delegate* the appointment of "officers". The Constitution gave the Congress power to *vest* appointive power not the power to vest the power to *delegate* appointive power.

That Congress may not, itself, delegate the appointment of an officer of the United States in other than a Cabinet member is shown by *United States* v. *Germaine*, 99 U. S. 508, *supra*. In that case Congress created an office and delegated the power to appoint to one other than a Head of a Department. This court promptly held that he was not an officer. If then Congress could not directly vest such an appointment in a person other than a Cabinet officer, then, *a fortiori* it could not indirectly do so by delegating the power to the Cabinet officer to vest the power in a third person.

It is true that Congress has, as contended by the Government, given the Head of a Department the right to delegate to subordinates "the power to employ such persons for duty in the field services (as might be required)". However, there the Congress used the words "employ" and "employees" as distinguished from "appoint" and "officers".

We respectfully insist that petitioner was not appointed pursuant to the Constitutional provision and his employment pursuant to the provisions of 5 U. S. C. 43 did not constitute him an officer of the United States.

(2) The Secretary Was Not Required to Make the Appointment

We take it the Court will judicially notice the fact that all persons employed by the Government are employed pursuant to some power delegated downward. The Government put up an expert witness in this case who testified:

> "These were the channels: The Secretary of War had the final authority, but he delegated to his Quartermaster General and, in turn to the quartermaster officer at the field station, the authority to appoint" (Pafford tr. 214, R. —).

The Secretary was not required to appoint and indeed had divested himself of the necessity of his action, which under 5 U. S. C. 43 he was authorized to do.

In *U. S.* v. *Mouat, supra,* it was held that a paymaster's clerk appointed by a Navy paymaster with the *approval* of the Secretary of Navy was not an officer of the United States because there was no "act *requiring* his approval of such an appointment." In *U. S.* v. *Smith,* 124 U. S. 525 this court has held that a customs clerk was *not* an officer of the United States, even though his appointment had been *approved* by the Secretary of the Treasury, because the *appointment* was not made by the Secretary, nor was his approval thereof *required.* That the approval of the department head must be *required* before a person is within the phrase is clearly demonstrated further in that opinion. In considering the effect of *United States* v. *Hartwell,* 6 Wall. 385 on its holding the Court said that the fact that in the case of *Hartwell* the appointment could *only* be made with the approbation of the Secretary distinguished it from the *Smith* case where such approbation was *not required.* The Court said, "The *necessity* of the Secretary's approbation to the appointment distinguishes that case essentially from the one at bar." (Emphasis ours.) In the *Hartwell* case the person was held to be an officer because of that necessity of action by the Department head; in the *Smith* case, lacking that requirement, the person was held *not* an officer.

So in the case now before the court under the Statute which the Government contends is the authority for em-

ployment, it is specifically provided that such approbation is not a necessary requisite. Therefore, under the *Smith* and *Mourat* cases this petitioner cannot be an "officer of the United States."

(3) There Is No Statute Specifically Creating the Office of Firefighter

The third prerequisite which we contend must be present to make one an "officer" of the United States is that the position must be specifically created by law. Phrased another way, we contend that there can be no "officer" if there is no "office".

Again we assume that the court will judicially notice that there is some authority for the employment of every person employed by the Government. The various jobs must have been provided for by an appropriation or else no legal payment could be made to the employee. There is, however, a vast difference in making provision for compensation to a general class, including thousands of persons with various duties, and making provision for a specific position with specific duties.

In *United States* v. *Hartwell*, 6 Wall. 385, 393 this court said that the term "office", "embraces the ideas of tenure, duration, emolument, and duties." We take it there is no question that for an "office" to exist it must be created by Congress. See *United States* v. *Schlierholz*, 137 Fed. 616. If we follow the rule in the *Hartwell* case, the *Congress itself* must provide for the "duration, emolument and duties" if it is to have the status of "office". Where in the case at bar has Congress made any such provision? The only provision is a large sum of money appropriated for the payment of salaries to civilian employees generally—no salary for a firefighter, no duties of a firefighter, no tenure or duration. It clearly appears that if that is the

sort of provision meant by the Constitution, then every one of the millions of jobs in the Government is *specifically* created by law. Such a position is, to us at least, absurd. The Constitution, nor Congress, intended such a result.

This proposition is not novel. This court has answered it, and answered it as we contend. The question was before the court in *Burnap* v. *United States, supra.*

There a person had been appointed landscape architect in the office of Public Buildings and Grounds. He had been appointed by the Secretary of War. The court decided he was not an officer but an employee. In so doing Mr. Justice Brandeis speaking for the court said (page 516), "Whether the incumbent is an officer or an employee is determined by the manner in which *Congress* has *specifically* provided for the creation of the several positions, *their duties and* appointment thereto." Again the court said at page 517, as a basis for holding Burnap not to be an officer, "There is *no statute* which *creates* an *office* of landscape architect in the office of Public Buildings and Grounds *nor any which defines the duties* of the position. The only authority for the appointment or employment of a landscape architect in that office is the legislative, executive, and judicial appropriation Act of June 17, 1910." (Emphasis ours.)

In that decision this court has answered the questions here. First, to create an office it must be done *by an act* of Congress and *that act* must provide for the duties. Secondly, a mere appropriation act does not create an office.

In the case before the court the only Congressional authority is the power delegated to Department Heads to employ persons for the field services and a general appropriation act for their compensation. Under the decisions of this court that did not create an office and does not give the petitioner the status of an officer. This is the rule which the Sixth Circuit recognized in the *Beal* case, and we submit correctly so.

Decisions of Other Courts

We have generally limited citations to cases decided by this Court in which it has considered and interpreted the decisive phrase "officer of the United States." We have done so because; first, those decisions and the principles therein laid down fully cover this case and, we believe, demand a finding that the petitioner is not an "officer of the United States;" secondly, the decisions of the lower courts in considering the question are in conflict, if not this case wouldn't be here.

However, for the convenience of the court, we will cite to it such cases, considering this question, as we have at hand in order that this court may have the benefit of whatever aid those decisions might give.

(1) Cases holding *not* an officer.

Beal et al. v. *United States*, 182 F. (2d) 565 (C. C. A. Ky. 1950).

In that case the court held that persons in precisely the same situation as petitioner were not officers of the United States. The court there relied on *Burnap* v. *U. S.*, *supra*, and held that the office must be specifically created and that "appropriation acts do not create offices. There must be a basic authority for the creation of an office."

Cain v. *United States*, 73 F. Supp. 1019.

That case was an action brought by a former secretary to a federal Judge under the Tucker Act and involved the very question here for determination. The court held, even though appointed by a court of justice, he was not an officer because his job was not specifically created by an Act of Congress—holding, relying on the *Burnap* case, that appropriation acts do not create offices.

Brooks v. *United States*, 33 F. Supp. 68.

The plaintiff was a Naval petty officer appointed by his commanding officer under a general delegation—the court held he was not an officer.

Scully v. *United States*, 193 Fed. 185.

In a full and well reasoned opinion, which relied on the decisions of this court heretofore cited, the court held that a deputy surveyor was not an "officer" so as to be precluded from the forum of the district courts in an action for compensation. The court said, even though an act required *approval* of the Secretary of Interior to his appointment, still where the appointment was made by another he was not an officer.

Morrison v. *United States*, 40 F. (2d) 286.

The plaintiff was appointed by his commanding officer under the authority delegated to him by the Secretary of the Navy in accordance with Congressional sanction to distribute the business as the Secretary might think expedient. The court held he was not an officer because (1) the position was not specifically created, *and* (2) this was not an appointment by a department head.

All of those cases base their decision on the reasoning advanced by this court in its decisions. They are, we submit, the correct application of those rules.

(2) Cases holding "Officer".

Kennedy v. *U. S.*, 146 F. (2d) 26.

In that case it was held that a mathematics professor appointed pursuant to an appropriation was an officer. Nowhere in the decision nor in the record before the court was the rule laid down by this court in the *Burnap* case considered or applied. We submit the decision was wrong.

Surowitz v. *U. S.*, 80 Fed. Supp. 716, 719.

In which the court *doubtfully* held a person appointed pursuant to 5 U. S. C. 43 to be an officer. The court there completely overlooked the decisions of this court previously alluded to.

Oswald v. *U. S.*, 96 F. (2d) 10.

A court reporter appointed by (1) a court of justice, (2) pursuant to an act of Congress specifically creating that position, was held to be an "officer". We think correctly so for, as pointed out above, the act specifically created the position and courts of Justice have the constitutional appointive power. The case is not at variance with our position.

Callahan v. *United States*, 122 F. (2d) 216.

A customs service employee appointed by the Secretary of the Treasury was held to be an officer. Again it appears the person was appointed by a department head pursuant to specific authority which "authorized and directed" the appointment. That case is authority for our position.

Foshay v. *United States*, 54 F. (2d) 668.

A postal clerk *appointed by the Postmaster General* (a cabinet officer) was held to be an "officer".

Baskins v. *United States*, 32 F. Supp. 518.

A prison guard *appointed by the Attorney General.* There the plaintiff termed himself an officer.

Henderson v. *U. S.*, 74 F. Supp. 343, and
Jentry v. *U. S.*, 73 F. Supp. 899, 901,

which reached the absurd result sought by the Government that: "This exception (the jurisdictional prohibition) is applied to every grade of employee of the Federal Government."

The Intention of the Law

Much was said by the Government below and will no doubt be said here about the intention of the Statute being to exclude all employees from the District Court Forum.

The physical situation demonstrates that no such intention is present. There are millions of employees of the Government. If this provision excludes them all from litigating in the Federal District Courts it throws the entire burden on the Court of Claims. Certainly such a burden on that Court would be impractical and was not intended by Congress.

As was said in *Scully* v. *United States, supra*, page 186:

"The Government is served by a vast number of persons, and it is possible that any one of these may have a demand which requires adjustment by some tribunal. *The statute does not refer to all cases brought for services rendered to the government by any of its servants, agents, officers, or employees,* but only to those which are brought by officers of the United States for official services." (Emphasis ours.)

The court then goes on there to say: "By the term 'official services', as used in the statute, we are to understand only those services which are peculiar to the office of an officer of the United States; and which such officers are *by law* authorized or required to perform. (Emphasis ours.)

We are ever mindful of the fact that the statute chose the word "officer" instead of some more embracing term. Had the intention of the statute been to exclude all, other more embracing terms would have been used. As was said by this court in *United States* v. *Germaine, supra,*—

"If (the statute) were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; * * *." How simple in the case

before us it would have been for Congress to use some far-reaching term, and let it be remembered that this statute was readopted and the well defined word "officer" retained in 1948 when the judicial code was revised.

The proviso relied on by the government is not to be stretched and strained, as is sought by the government, to resist all claims.

In *United States* v. *McElvain*, 272 U. S. 633, this court held:

"The purpose of the added proviso was to carve out a special class of cases. It is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose."

We think it clear that this statute was meant to apply only to a limited class and not to throw the burden of all claims of employees on one forum—common sense does not admit such an interpretation.

Conclusion

We have sought to demonstrate to the court that under its own decisions there must be three prerequisites found before the status of "officer" is shown to exist. We think further that it is shown that if any *one* is missing the status is not established. Those prerequisites are:

(1.) The appointment must have been made by a cabinet officer, not pursuant to delegated authority from a cabinet officer.

(2.) The appointment must be required to be made by that officer.

(3.) The position must be specifically created by law and is not specifically created by an appropriation act.

it necessary that there be an act of Congress specifically creating the position before the incumbent thereof can be said to be an officer. The overwhelming majority of the cases dealing with the question of whether a person was an officer of the United States turn upon the nature of the appointment rather than upon the nature of, or authority for, the position. In so far as the question of the creation of a position has been concerned, it has been ordinarily regarded that an appropriation act, generally authorizing the employment, is sufficient congressional approval of the position. The few recent cases to the contrary are not persuasive.

ARGUMENT

I

Public Law No. 248 of October 31, 1951, Deprives Federal District Courts of Jurisdiction Over Pending as Well as Prospective Suits by Employees of the United States to Recover Fees, Salary, or Compensation for Their Official Services

The Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, conferred jurisdiction upon the district courts and the circuit courts of the United States, concurrently with the Court of Claims, to entertain suits against the United States, with their jurisdiction limited only as to amounts.[4] As shown in more detail below (*infra*, pp. 22-24), shortly thereafter numerous suits were commenced in the various district courts by Navy Yard mechanics

[4] The jurisdictional limit of the district courts was $1,000 and that of the circuit courts was $10,000.

and letter carriers to recover additional compensation. The volume of these suits and the difficulty of successfully conducting the defense in such suits throughout the United States led to the enactment of the Act of June 27, 1898, 30 Stat. 494, which withdrew from district courts jurisdiction to entertain actions or claims for salaries, fees and compensations for official services of "officers of the United States." This amendment procured the desired result and thereafter the Court of Claims became the recognized and almost exclusive forum for the prosecution of such suits.[5] Within the last few years, however, an increasing tendency on the part of officials and employees of the United States

[5] So far as we have been able to ascertain, between 1898 and 1945 only six District Court cases have entertained compensation suits by persons who might be considered "officers of the United States." In *United States* v. *Swift*, 139 Fed. 225 (C.A. 1, 1905), it was held that a bailiff appointed by a marshal was not an "officer of the United States," but only of the court because, among other reasons, "bailiffs are never sworn in accordance with the statute." In *Scully* v. *United States*, 193 Fed. 185 (C.C. D. Nev., 1910), a demurrer to a suit brought by a deputy surveyor to recover compensation for services rendered pursuant to a contract entered into between him and the United States, acting by the General Surveyor, was overruled on the ground that he was not an officer of the United States, the court stressing the fact that his appointment was not made subject to approval by the head of the Department. In *Morrison* v. *United States*, 40 F. 2d 286 (S.D. N.Y., 1930), the court held that petty officers of the Navy were not officers within the meaning of the statute. While this decision is, in our view, plainly incorrect, Morrison was clearly entitled to recover on the merits, and some $5000 in pay and allowances had been owing to him since 1925; no appeal was taken. In *Brooks* v. *United States*, 33 F. Supp. 68 (E.D. N.Y., 1939), the court, while adopting generally the line of approach of the *Morrison* case on the jurisdictional question, held with the United States on the merits, and so no appeal could be taken. In *Ducey* v. *United States*

to resort to district courts for the recovery of compensation has manifested itself, which tendency was given a strong impetus by the recent decision of the Court of Appeals for the Sixth Circuit in *Beal* v. *United States,* 182 F. 2d 565 (May 29, 1950), which held that the term "officer," as employed in the 1898 Act, referred to constitutional officers in the strictest sense and not to persons who were merely employees of the United States. This Court denied the Government's petition for a writ of certiorari, 340 U.S. 852, apparently unimpressed by the contentions that the question was one of importance and that the decision in the *Beal* case was in conflict with that of the Fifth Circuit in *Kennedy* v. *United States,* 146 F. 2d 26.[6] In the instant case, both the District Court and the Court of Appeals held that

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(D. Minn., 1945, unreported), the court allowed recovery by a physician appointed by the Veterans Administrator, on the ground that he was not an officer of the United States. No appeal was taken because only $60 was involved and the case was unreported. In *Cain* v. *United States,* 73 F. Supp. 1019; 77 F. Supp. 505 (N.D. Ill., 1947, 1948), the suit was by a secretary appointed by a judge, and not by the court or the Director of the Administrative Office of the United States Courts. While the rationale of many of these cases is, in our opinion, incorrect, several are borderline cases, and neither their number nor importance suggested the desirability of procuring amendatory legislation.

[6] The *Beal* case, like the instant case, involved the question of overtime for fire fighters. That same question had been before the Court of Claims in *Conn* v. *United States,* 107 C. Cls. 422, certiorari denied, 332 U.S. 757, rehearing denied, 332 U.S. 819, and the right of such fire fighters to overtime had been denied by the Court of Claims. It is readily understandable why neither Beal nor the petitioner sought to invoke the jurisdiction of the Court of Claims which had already decided the question on the merits against them, but chose instead to try another forum.

petitioner had no standing to maintain his suit, relying upon the *Kennedy* action. This Court granted certiorari on October 22, 1951, apparently because of the direct conflict between the instant case and the decision of the Sixth Circuit in the *Beal* case.

It is in this setting that Public Law No. 248, of October 31, 1951, must be considered.[7] Section 50 (b) of that statute amended 28 U.S.C. 1346(d)(2) to read as follows:

> (d) The district courts shall not have jurisdiction under this section of:
>
> (1) Any civil action or claim for a pension;
>
> (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States.

As its legislative history indicates, (*infra*, pp. 25-26), Congress was undertaking to eliminate the divergence of views which had commenced to manifest itself in lower federal courts by making "it more clearly appear" that those courts lacked jurisdiction to entertain suits for salary or compensation brought either by officers (in the strict sense) or employees. If the amendment be regarded as merely restating what the law has always been, then there never was any jurisdiction

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[7] The bill passed both houses of Congress on October 20, 1951, and was submitted to the President on October 22, 1951 (97 Cong. Rec., daily ed. 13946, A7140). It was approved by the President on October 31, 1951, and became law on that date. This Court granted certiorari in this case on October 22, 1951.

in district courts to entertain suits of this nature; if it effected a change in the law, then it automatically deprives the district court of any jurisdiction longer to entertain a suit for salary or compensation by an employee of the United States. Whether the amendment be regarded as a legislative interpretation of the 1898 Act or whether it be regarded as constituting new legislation, the end result is the same: United States District Courts have no present jurisdiction of suits by officers or employees for fees, salary, or compensation.

Petitioner asserts that he is an employee and not an "officer" within the meaning of Section 1346 (d)(2), as it formerly stood. But that section now clearly deprives the district courts of jurisdiction over salary suits by Government employees, as well as Government "officers", and petitioner's suit must therefore be dismissed. It is settled that —in the absence of a statutory savings provision or comparable special rule of law—no judgment can be rendered in a suit after the repeal of the Act under which it was brought and prosecuted and "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, * * * the court must decide according to existing laws". *United States* v. *The Schooner Peggy,* 1 Cranch 103, 110; *Norris* v. *Crocker,* 13 How. 429, 439; *Insurance Company* v. *Ritchie,* 5 Wall. 541, 544; *Ex Parte McCardle,* 7 Wall. 506, 512-514; *Dinsmore* v. *Southern Express Co.,* 183 U.S. 115, 120;

Crozier v. *Krupp*, 224 U.S. 290, 302; *Gulf, C. & S. F. Ry.* v. *Dennis*, 224 U.S. 503, 506; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U.S. 9, 21; *Carpenter* v. *Wabash Ry. Co.*, 309 U.S. 23, 27; *Standard Oil Co. of Kansas* v. *Angle*, 128 F. 2d 728, 730 (C.A. 5); *Seese* v. *Bethlehem Steel Co.*, 168 F. 2d 58, 62 (C.A. 4).

The rule is peculiarly applicable where it is the jurisdiction of the court that is withdrawn during the course of litigation. Thus, in *Ex Parte McCardle, supra*, Congress, after the case had been argued on the merits and while it was under advisement by this Court, withdrew the jurisdiction of this Court to review judgments of the circuit courts in cases involving petitions for writs of habeas corpus. In holding that the withdrawal of jurisdiction rendered unnecessary a discussion of any other question, Chief Justice Chase, speaking for the Court, stated (7. Wall, at 512, 514):

> The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the Act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.
>
> * * * * * * *
>
> * * * the general rule, supported by the best elementary writers [Dwarris, Stat. 538], is that "*when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.*" And the effect of repealing acts upon suits under acts repealed, has been determined

> by the adjudications of this court. The subject was fully considered in *Norris* v. *Crocker* [13 How. 429], and more recently in *Insurance Company* v. *Ritchie* [5 Wall. 541.] In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted." [Emphasis added.]

See also, to the same effect, *De Groot* v. *United States*, 5 Wall. 419, 432; *Insurance Co.* v. *Ritchie*, 5 Wall. 541, 544; *Gordon* v. *United States*, 7 Wall. 188, 195; *Ex Parte Yerger*, 8 Wall. 85, 104; *The Assessor* v. *Osbornes*, 9 Wall. 567, 575; *United States* v. *Tynen*, 11 Wall. 88, 95; *Railroad Co.* v. *Grant*, 98 U.S. 398, 401; *In re Hall*, 167 U.S. 38, 42; *Gwin* v. *United States*, 184 U.S. 669, 675; *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234; *Smallwood* v. *Gallardo*, 275 U.S. 56, 61-2; *United States* v. *Wheelock Bros., Inc.*, 341 U.S. 319.

The identical problem here presented arose when Congress first passed the 1898 Act amending Section 2 of the Tucker Act (now 28 U.S.C. 1346(d)(2)). In *United States* v. *Kelly*, 97 Fed. 460 (C.A. 9) and in *United States* v. *McCrory*, 91 Fed. 295 (C.A. 5), suits had been brought for a recovery of salaries by postal carriers while such suits were permitted. After the judgments of the district court in favor of the employees, and while the cases were before the appellate courts on writs of error, Congress enacted the amendment depriving the district courts of jurisdiction of suits for

compensation by officers of the United States. Both courts held that the 1898 amendment effectively deprived the district courts of jurisdiction and abated the writs of error.[8] Following these and similar holdings, which left many claimants precluded by limitations from suing in the Court of Claims (Cf. H. Rept. No. 72, 56th Cong., 1st Sess.), Congress, by the Act of February 26, 1900 (31 Stat. 33), provided that no action, pending on June 27, 1898, should abate or be affected by the passage of that Act, and that all suits dismissed by reason of "said Act" should be restored to their places in such courts and proceeded with as if the same had not been enacted.

The fact that Congress passed the 1951 amendment to Section 1346 (d)(2) without a saving

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[8] In the *Kelly* case, the Court of Appeals for the Ninth Circuit stated (pp. 460-461):

> The question arises whether the act deprives the courts of the United States of jurisdiction of causes which were pending at the time of its enactment. * * * In the circuit court of appeals for the Fifth circuit, in U. S. v. McCrory, 33 C.C.A. 515, 91 Fed. 295, it was held that the effect of the statute was to deprive the courts of the United States of jurisdiction to entertain pending cases. * * * The supreme court in a series of decisions has recognized the doctrine that, when jurisdiction of a cause depends upon a statute, the repeal of the statute without a reservation as to pending cases deprives the court of all the jurisdiction which the act conferred. * * *

In *Smallwood* v. *Gallardo*, 275 U.S. 56, 62, this Court expressly held that a statute withdrawing jurisdiction from the trial court effectively ends the case even though it had already been appealed to a higher court. "When the root is cut the branches fall."

clause [9] is critical, for only by virtue of a saving clause, similar to that embodied in the Act of February 26, 1900, can the repealing statute be precluded from abating pending cases as well as those commenced subsequent to the act. *Insurance Co.* v. *Ritchie,* 5 Wall. 541, 544; *Ex parte McCardle,* 7 Wall. 506, 514; *The Assessor* v. *Osbornes,* 9 Wall. 567, 575; *United States* v. *Tynen,* 11 Wall. 88, 95; *Railroad Co.* v. *Grant,* 98 U.S. 398, 401.; *In re Hall,* 167 U.S. 38, 42; *Gwin* v. *United States,* 184 U.S. 669, 675; *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 234. Thus, in *Railroad Co.* v. *Grant,* 98 U.S. 398, 401, this Court stated, "It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law." Likewise, in *Gwin* v. *United States,* 184 U.S. 669, 675, this Court declared: "* * * a repealing statute which contains no saving clause operates as well upon pending cases as those thereafter commenced." [10]

It is plain that there is no specific saving clause applicable to this case. Nor is petitioner's suit

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[9] P. L. No. 248 did not contain a saving clause for "rights or liabilities" existing under certain other statutes which were repealed, in whole or in part, by that Act. See Section 56 (l), 65 Stat. 720.

[10] Unless the 1951 amendment somehow preserves the future jurisdiction of the District Court to hear and decide petitioner's case, it is impossible for him to recover. Unlike the *Kelly* and *McCrory* cases (*supra*, pp. 14-15), the District Court had held *against* petitioner before the 1951 amendment, and it cannot now enter a judgment in his favor unless it continues to have jurisdiction. Cf. *United States* v. *Wheelock Bros., Inc.,* 341 U.S. 319.

saved by the general saving clause (1 U.S.C., Supp. IV, 109). Even on the doubtful assumption that that statute applies to "liabilities" of the United States, it can only be read as preserving "liabilities" incurred under the statute which is repealed. Here, the Government's liability, if any, was not incurred under, or created by, Section 1346(d)(2), which is no more than a consent to suit. The liability continues and may be vindicated, if it exists, in the Court of Claims. The general saving clause was not intended to affect mere withdrawals of consent to sue the United States. Cf., *Lynch* v. *United States*, 292 U.S. 571, 581-2.

The instant case is clearly governed by the above rules. The existing law is that district courts do not have jurisdiction over actions such as that filed by petitioner. And in the absence of a savings clause that law must be applied here. It follows that in all pending cases, involving suits for salary, fees or compensation by officers or employees of the United States, the district courts no longer have jurisdiction, if they ever had, and petitioner can no longer maintain his suit.

Thus far in this Point, we have assumed that the 1951 amendment did not purport retroactively to limit the jurisdiction of the District Courts in these salary claims cases. But it may very well be that Congress did more than simply withdraw jurisdiction for the present and future. The amend-

ment's legislative history (*infra*, pp. 25-26) shows that Congress was clarifying and making explicit what it deemed to have been the law since 1898. In these circumstances, the 1951 statute can be viewed as a retroactive construction and amendment of the prior statute—a retroactive provision which furnishes the rule to govern the courts in transactions which are past. *Stockdale* v. *The Insurance Companies*, 20 Wall. 323, 331-332.

There is nothing unconstitutional in such retroactive legislation. Litigants are not being deprived of a claim or of the right to maintain an action. Congress has merely indicated the forum in which they are to proceed. This Court stated in *Ex parte Collett*, 337 U.S. 55, 71: "'No one has a vested right in any given mode of procedure * * *' *Crane* v. *Hahlo*, 258 U.S. 142, 147 (1922)." See also *Hallowell* v. *Commons*, 239 U.S. 506, 508. In particular, withdrawal of consent to suit invades no constitutional rights. See *Lynch* v. *United States*, 292 U.S. 571, 581-2.[11]

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[11] In *Kline* v. *Burke Construction Co.*, 260 U.S. 226, this Court, in rejecting the contention that the retroactive application of a repealing statute upon pending cases violated a constitutional right by depriving a litigant of a judgment of a lower court in his favor, stated at page 234:

> * * * Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. * * * The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it re-

II

The Courts Below Correctly Held That Petitioner Is an "Officer of the United States" Within the Meaning of 28 U.S.C. 1346(d) (2), Prior to Its Amendment on October 31, 1951

For the reasons stated above (pp. 8-18), we submit that the amendment of October 31, 1951, is dispositive of the instant controversy and that it is unnecessary for the Court further to inquire into the correctness of the decision below. However, we also submit that the decision below is correct on the basis of the law as it stood at the time of the lower courts' decisions.

The question which the courts below were called upon to determine was whether the word "officer" as used in 28 U.S.C. 1346(d)(2), prior to the amendment of October 31, 1951, was intended to be limited to the classification of constitutional "officers" of the United States, as that term is employed in Article II, Section 2, of the Constitution, or whether it was intended to include all regular government employees. A subsidiary question is whether, assuming that the term was restricted to those persons whose appointment is

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quires an act of Congress to confer it. *The Mayor* v. *Cooper*, 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors* v. *Osbornes*, 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.

provided for in Article II, Section 2, the petitioner falls fairly within that class. We submit that the decision below is sustainable upon either or both of these grounds.

A. *Under 28 U.S.C. 1346(d)(2), the District Court lacked jurisdiction of a suit for salary or compensation by any regular employee of the Government.*

The jurisdictional statute, as it read prior to the 1951 amendment, withheld jurisdiction from the district courts of suits by "officers" of the United States for compensation for official services. Petitioner urges that the word "officers" must be interpreted in the sense in which it was used in Art. II, Sec. 2, of the Constitution and that it did not comprehend employees of the United States who did not come within that classification. But numerous decisions of this Court warn that most "words have different shades of meaning and consequently may be variously construed * * *, * * * the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which these purposes are expressed, and of the circumstances under which the language was employed." *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433. An expression in a statute may have a different meaning from precisely the same expression in constitutional provisions. *Towne* v. *Eisner*, 245 U.S. 418, 425; *Gully* v. *First National Bank*, 299 U.S. 109, 117-118. Thus,

this Court has held that a Navy paymaster's clerk is not an "officer" within the meaning of that word as used in one statute (*United States v. Mouat*, 124 U.S. 303), but, in a decision handed down the same day, equally held that such a clerk was an "officer" for the different purposes of a different statute (*United States* v. *Hendee*, 124 U.S. 309).[12] And in *Steele* v. *United States No. 2*, 267 U.S. 505, 507-508, the Court expressly rejected the contention that the expression "civil officer of the United States duly authorized to enforce, or assist in enforcing, any law thereof", as used in the Espionage Act of 1917, was limited to constitutional officers. On the contrary, it construed the expression to have been intended by Congress to comprehend all those persons who are most widely employed to enforce or assist in enforcing laws, irrespective of whether they are constitutional officers.

Where a word such as "officer" may have varying meanings in different contexts, we submit that, in order to ascertain its meaning in a particular statute, resort should be had to the intent of Congress and the end which the statute was fashioned to achieve, and that that intent should be controll-

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[12] In the *Hendee* case, the Court stated (p. 313):

> We have just decided, in the case of *United States* v. *Mouat*, *ante*, 303, that a paymaster's clerk is not, *in the constitutional sense of the word*, an officer of the United States; but we added also that *Congress may have used the word "officer" in a less strict sense in some other connections*, and in the passage of certain statutes might have intended a more popular signification to be given to that term. [Emphasis added.]

ing. Cf. *Mitchell* v. *Cohen*, 333 U.S. 411, 417-420. Here, the legislative history of the 1898 amendment, which withheld jurisdiction of salary claims by "officers of the United States" (*supra*, p. 9), plainly discloses a definite congressional intent to withdraw jurisdiction of all federal salary claims from the district court and to require all ordinary employees of the United States to resort to the Court of Claims if they sought to vindicate their right to compensation by suit against the United States.

Following the enactment of the Tucker Act and prior to the Act of June 27, 1898, suits by government workers for compensation could be freely maintained in the district courts. *United States* v. *McCrory*, 91 Fed. 295 (C.A. 5). The volume of overtime pay suits, filed by letter carriers and navy yard mechanics as a result of the Acts of May 24, 1888, c. 308, 25 Stat. 157, and of August 1, 1892, c. 352, 27 Stat. 340, providing for an eight-hour day, soon became a problem.[13] Repeated recom-

[13] The Annual Report of the Attorney General in 1894 discloses that the fiscal year 1894 saw 37 district court letter carriers' overtime cases disposed of, but 1,025 individual judgments had to be entered in the 37 cases. In fiscal 1895, of the total of 48 new suits filed in the district courts under the Tucker Act, 15 were suits for mechanics' overtime, the number of individuals suing not being specified. In fiscal 1897, of 47 new suits, 19 were for letter carriers' overtime, the number of individuals suing again left unspecified. As a result of congressional enactment of the recommended legislation in 1898, however, it was reported in 1900 that the total of all new Tucker Act suits outside the Court of Claims had been reduced to 18, the reduction being attributed to the exclusion of suits for compensation by government employees (*ibid.*, 1900, p. 54).

mendations were made for the restriction of such litigation to the Court of Claims (*e.g.*, Annual Report of the Attorney General, 1894, p. 10, 1897, p. 7). Thus, in 1895, the Attorney General reported: "I recommend that claims of United States officers or employees for compensation, expenses, or fees be excluded from the jurisdiction of the circuit and district courts" (*ibid.*, 1895, p. 15).

Congress responded to these recommendations by amending the Tucker Act so as to withdraw from the district courts jurisdiction to entertain "cases brought to recover fees, salary, or compensation for official services of officers of the United States." Act of June 27, 1898, 30 Stat. 494, 495. The reason for the amendment and its purpose were stated in H. Rept. No. 325, 55th Congress, 2d Session, February 1, 1898,[14] to be as follows:

> First. That the circuit and district courts are widely separated geographically, and often while one of them may be deciding a question in one way another may be deciding it another way; and there is now a large number of conflicting judgments on the same questions.
>
> Second. Cases are brought against the United States at places remote from the capital, of which the proper Department is not advised, and proper defenses are impracticable and are often not made. For example—
>
> The act of July 31, 1894, provides that no person holding an office worth $2,500 per annum shall hold another compensated office.

[14] There is no other pertinent material either by way of a Senate report or in the debates. Cf. 31 Cong. Rec. 1731.

> A held the office of clerk of the circuit court of appeals, of which the compensation exceeded $2,500. He also held the office of clerk of circuit court of the United States, with large compensation. The Treasury refused to pay him for the second office. He thereupon brought suits quarterly in the district court of the United States for less than $1,000, and for a while recovered.
>
> Many other abuses might be cited of a similar general character.

The report thus evidences a congressional intent that suits for salary, overtime, fees, and every other type of official compensation were thereafter to be limited to the Court of Claims—a court located at the seat of the Government where departmental records are readily available and where the defense of the suits could be conducted by attorneys specializing in, and conversant with, the laws and regulations involved. Were the statute given the restrictive interpretation for which petitioner contends, the results which the statute was intended to achieve would be largely frustrated.[15]

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[15] In *Surowitz* v. *United States*, 80 F. Supp. 716, 718 (S.D. N.Y.), Judge Rifkind, in commenting on this issue, observed:

> Superficially, it might be argued that Congress intended to allow run-of-the-mill employees to have convenient access to the federal courts of the districts of their residence but to require the more important officials of the government to assert their claims in the Court of Claims in Washington. This argument will not stand inspection. The judicial history of the term "officers" makes abundantly clear that neither the importance of the task nor the size of the compensation has any bearing upon the classification.

That the term "officer", as employed in the 1898 Act, was understood to include all regular civil-service employees is underscored by the avowed reasons which led Congress to adopt the 1951 amendment (discussed below). As now provided, the district courts have no jurisdiction of salary claims by officers *or employees* of the United States. The legislative purpose in amending the section to include the term "employees" is set forth by both the House and Senate Reports on the proposed amendment, which state (H. Rept. 462, 82nd Cong., 1st Sess., p. 14; S. Rept. 1020, 82nd Cong., 1st Sess., p. 16):

> Subsection (b) amends section 1346(d)(2) of title 28, United States Code, *to make it more clearly appear* that the jurisdiction of the district courts does not include actions or claims for fees, salary, or compensation of federal officers or employees. [Emphasis added.]

The implication is plain that ever since the inclusion of this jurisdictional provision in the Tucker Act in 1898 Congress had meant "officers" to include all regular government employees, and that the purpose of the 1951 amendment is only "more clearly" to carry out that intention.[16] This construction is further supported by the legislative debate on the bill to amend certain titles of the United

[16] It should be noted that it was only in very recent years that the bringing of salary suits in the district courts had again become a problem. See *supra*, pp. 8-10.

States Code (which became P. L. No. 248) which reveals that Congress did not consider this amendment to be a change in substantive law but merely to be expository of existing law. During the consideration of the bill by the House of Representatives, the following discussion ensued (97 Cong. Rec. (daily ed.) 13845-6):

> Mr. REED of Illinois. Mr. Speaker, reserving the right to object, am I correct in understanding that this bill is merely clarifying and corrective as to certain titles of the code, and that in only one instance is there any substantive law involved, and that is, as I recall, where an appeal is permitted from the District Court of Guam to the Ninth Circuit? * * *
>
> Mr. BRYSON: [Floor leader of the bill] That is true.
>
> Mr. REED of Illinois: Mr. Speaker, I withdraw my reservation of objection.

The congressional understanding that the construction expressly set out in the amended statute should have been applied from the inception of the exception to jurisdiction is clear. This legislative construction, even though it may not be binding on the judiciary [10a] "May be considered to assist in the interpretation of prior legislation upon the same subject" (*Tiger* v. *Western Investment Co.*, 221 U.S. 286, 309) and "would go far to remove doubt as to its meaning if any existed" (*First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640,

[10a] For the rule as to a retroactive amendment, as distinguished from a legislative construction, see *supra*, pp. 17-18.

658). See also *Cope* v. *Cope*, 137 U.S. 682, 688; *N.Y., Phila. & Norfolk Rd. Co.* v. *Peninsula Produce Exchange*, 240 U.S. 34, 39-40; *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277; *White* v. *Winchester Country Club*, 315 U.S. 32, 39.

Any construction of the section in question holding that the term "officers," prior to the 1951 amendment, was limited to a few "high-level" officers and excluded the large majority of government workers would be in conflict with the intention of both the Congress which passed the 1898 Act and that which enacted the 1951 clarifying amendment. Nor is there undue hardship for petitioner or any litigant to sue in the Court of Claims, since the Court of Claims follows the practice upon request of the plaintiff of holding hearings for the taking of evidence at his place of residence or at locations serving his convenience and that of his witnesses.

B. *Every civil service employee appointed by authority of the head of his department and executing the required oath of office is an inferior constitutional officer of the United States within the meaning of "officer" in Section 1346(d)(2).*

We have undertaken above (pp. 20-27) to demonstrate that petitioner, even if only an "employee" of the United States, came within the prohibition of Section 1346(d)(2). However, we also submit that the decision below is equally sustainable on

the ground that petitioner is also an inferior officer within the intendment of Article II, Section 2 of the Constitution (Appendix, *infra*, p. 35).

In *United States* v. *Mouat*, 124 U.S. at 307, this Court set out the rule as to what constitutes a constitutional officer of the United States:

> What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this court in *United States* v. *Germaine*, 99 U.S. 508. In that case, it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a Department; and the heads of the Departments were defined in that opinion to be what are now called members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or by one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.[17]

The evidence presented to the District Court discloses that, in substance, petitioner meets the requirements of a constitutional officer of the United States as thus formulated.

In order to show the method of petitioner's

[17] See also *Burnap* v. *United States*, 252 U.S. 512, 516.

appointment, the Government submitted an affidavit of A. H. Onthank, the Director of Civilian Personnel of the Department of the Army (R. 28-29) as an exhibit to its motion to dismiss. This document disclosed that petitioner Bruner, after passing the required civil-service examination (R. 4), was appointed by the commanding officer of the local military installation on March 11, 1941, and the appointment was confirmed by the Secretary of War on May 20, 1941 (R. 28-29, 14). See *supra*, pp. 2-5.[18] Petitioner then executed the required oath of office (R. 24).[19] On the basis of these undisputed facts, the trial court concluded as a matter of law that (R. 5):

> This court does not have jurisdiction of this case as the plaintiff was an officer of the United States within the meaning of the Tucker Act (28 U.S.C., Sec. 1346(d)(2)). Plaintiff was appointed pursuant to the statutes and regulations as set out in the affidavit of A. H. Onthank, Director of Civilian Personnel, Department of the Army, said affidavit being a part of the record in this case as an exhibit to defendant's motion to dismiss.

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[18] Petitioner's Exhibit No. 1 (R. 14) and Government's Exhibit No. 6 (R. 25) show the recommendatory nature of petitioner's original designation and the confirmatory action by authority of the Secretary of War. Furthermore, paragraph 2 of the Onthank affidavit (R. 28) recited the statutory authority for appointment, via delegation under the Act of June 26, 1930, 46 Stat. 817; 5 U.S.C. 43, *infra*, p. 35, and the payment from annual appropriation acts of petitioner's salary.

[19] These ordinarily are indicia of an appointment to "office." *Collins* v. *Mayor*, 3 Hun. (N.Y.) 680, 681.

This holding of the District Court, affirmed by the court below, accords with the overwhelming weight of authority. The first reported case under the 1898 amendment was *United States* v. *McCrory*, 91 Fed. 295, 296. There, the Court of Appeals for the Fifth Circuit, in holding that a letter carrier was an officer within the meaning of the amendment, stated:

> It is argued that letter carriers are not officers of the United States, within the meaning of the statute in question, but are mere employes, not intended to be included in the statute. Letter carriers are appointed by the postmaster general under authority of the acts of congress, practically during good behavior. They are sworn and give bond for the faithful performance of their duties. They are paid from moneys appropriated for the purpose by congress, and their salaries are fixed by law. They have regularly prescribed services to perform, and their duties are continuing and permanent, not occasional or temporary. In U.S. v. Hartwell, 6 Wall. 385, 393, the supreme court declared that "an 'office' is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." In U.S. v. Germaine, 99 U.S. 508; Hall v. Wisconsin, 103 U.S. 5, 8; U.S. v. Perkins, 116 U.S. 483, 6 Sup. Ct. 449; U.S. v. Mouat, 124 U.S. 303, 8 Sup. Ct. 505; U.S. v. Smith, 124 U.S. 525, 8 Sup. Ct. 595; and in Auffmordt v. Hedden, 137 U.S. 310, 11 Sup. Ct. 103,—U.S. v. Hartwell, supra, is cited with

approval. An examination of these cases, all bearing on the question in hand, will show that, in the opinion of the supreme court, where a person is appointed under authority of law by the head of a department, and his duties are continuing and permanent, and his emolument fixed, such person is an officer of the United States; and that, within the constitutional meaning of the term. Letter carriers, therefore, are officers, within the meaning of the above-quoted statute, restricting the jurisdiction of the circuit and district courts in regard to suits brought against the United States under the act of 1887.

Subordinate officials or employees similarly appointed, and with comparable status, have consistently been held to be "officers" of the United States in the constitutional sense. *Oswold* v. *United States,* 96 F. 2d 10 (C.A. 9) (court reporter); *Callahan* v. *United States,* 122 F. 2d 216, 218 (C.A. D.C.) (customs employees); *Borak* v. *Biddle,* 141 F. 2d 278, 281 (C.A. D.C.) (attorney); *Kennedy* v. *United States,* 146 F. 2d 26 (C.A. 5) (mathematics instructor, Air Corps); *Thomason* v. *United States,* 184 F. 2d 105 (C.A. 9) (Army Transport seaman). See also *Surowitz* v. *United States,* 80 F. Supp. 716 (S.D. N.Y.) (War Department attorney); *Henderson* v. *United States,* 74 F. Supp. 343 (S.D. N.Y.) (Army Transport seaman); *Jentry* v. *United States,* 73 F. Supp. 899 (S.D. Cal.) (Army Transport seaman); *Foshay* v. *United States,* 54 F. 2d 668 (S.D. N.Y.) (clerk).

Petitioner contends that those persons only are officers who have been appointed by a department head personally and not by the head's delegatee. But both the *Oswold* and the *Kennedy* cases, *supra*, held that approval by the department head was sufficient,[20] and it has generally been held that whether the department head has acted by approval or by delegation, as authorized by 5 U.S.C. 43 (*infra*, Appendix, p. 35), the appointee is an officer. *United States* v. *Hartwell*, 6 Wall. 385, 393; *McGrath* v. *United States*, 275 Fed. 294, 301 (C.A. 2); *Surowitz* v. *United States*, *supra*, 80 F. Supp. at 719; *Henderson* v. *United States*, 74 F. Supp. 343, 344 (S.D. N.Y.). Indeed, it may be doubted if many of the "inferior officers" whose appointment is vested by Congress in the department heads and whose suits for official compensation have been litigated were appointed by the department head acting in his proper person. See also *United States* v. *Marcus*, 166 F. 2d 497, 503 (C.A. 3), to the effect that statutory authority in the department head to appoint will be taken to mean that there was appointment or at least approval by him.

Petitioner also urges that to be an "officer of the United States"—even an inferior officer, as described in Article II, Section 2 of the Constitution—the party involved must be the incumbent of a position expressly created by statute. This is not

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[20] See Orders M and N of the Secretary of War delegating the appointive powers of the Secretary to his subordinates (R. 30-33) (*infra*, Appendix, p. 36). Petitioner's appointment was confirmed by the Secretary (R. 14, 29).

an element set forth in the classic definition of the *Mouat* case, *supra*, p. 28. Cf. *United States* v. *Germaine*, 99 U.S. 508; *United States* v. *Hartwell*, *supra*. Moreover, this argument, aside from its unrealistic approach to present day conditions, is one with which the courts, with the exception of the recent *Beal* case, have not concerned themselves (see cases cited, *supra*, pp. 30-31); they have been content to rely upon the fact that an appropriation act has authorized, at least inferentially, the creation of the position.

It is true that *Beal* v. *United States*, 182 F. 2d 565 (C.A. 6), certiorari denied, 340 U.S. 852, held that because the position of firefighter was not specifically authorized by statute the plaintiffs were not officers of the United States, and posited its holding upon some language of this Court in *Burnap* v. *United States*, 252 U.S. 512. We respectfully submit that the court in the *Beal* case misconstrued the *Burnap* decision. While there are certain words in the *Burnap* case which might seem to lend some support to the proposition for which it is cited in *Beal*, the major issue in the *Burnap* case was whether Congress had vested appointive power in the Secretary of War, as head of the department, to hire landscape architects. In holding that the Secretary of War lacked such power, this Court did not base its decision on the lack of a specific statute authorizing such appointment, but on the fact that a specific statute authorizing the Chief of Engineers to employ the landscape archi-

tect overrode the general provision conferring the power of appointment upon the head of a department.

Petitioner's appointment was conferred by and made under the authority of the head of his department and he took his oath of office for an indefinite period, at a predetermined salary, to perform supervisory functions in a well defined field of activity (fire fighting), the duties of which were set forth in an official manual issued by the War Department (Tr. 155, 161-163). Petitioner is thus squarely within the rule that "where a person is appointed under authority of law by the head of a department, and his duties are continuing and permanent, and his emolument fixed, such person is an officer of the United States; and that, within the constitutional meaning of the term." *United States* v. *McCrory*, 91 Fed. 295, 296 (C.A. 5).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

1. Article II, Section 2, of the Constitution reads in pertinent part as follows:

> [The President] * * * by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. The statutory provision authorizing employment of petitioner is the Act of June 26, 1930, 46 Stat. 817, 5 U.S.C. 43, which provides (as it appears in the United States Code):

> There is authorized to be employed in each executive department, independent establishment, and the municipal government of the District of Columbia, for services in the District of Columbia or elsewhere, such number of employees of the various classes recognized by sections 661-663, 664-669, 670-672, 673, and 674 of this title, as may be appropriated for by Congress from year to year: *Provided*, That the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons for duty in the field services of his department or establishment.

3. Orders N of the Secretary of War, December 23, 1941, read in part as follows (see R. 31-33 for full text):

> Appointments: Chief of Bureaus, Arms and Services are authorized to deal directly with the U.S. Civil Service Commission to effect appointments, including reinstatements and transfers from other Agencies, in the departmental service, subject to confirmation by the Secretary of War.

4. Orders M of the Secretary of War, August 13, 1942, read in part as follows (see R. 30 for full text):

> Authority is hereby delegated to the Commanding Generals, Services of Supply, Army Air Forces, and Army Ground Forces, to take final action on personnel transactions in the field service, except on separations with prejudice.

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